87-1488

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 198___

No. _____

Harold W. Schwartz,
Petitioner,

v

Mario Cuomo, Governor of the State of New York
Orin Lehman, Commissioner, New York State Office
Parks, Recreation and Historic Preservation,
Respondents,

PETITION FOR WRIT OF CERTIORARI

TO THE APPELLATE DIVISION, SECOND DEPARTMENT
OF THE SUPREME COURT OF THE STATE OF NEW YORK

Harold W. Schwartz
Petitioner Pro Se
2141 Crotona Ave.
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4488

QUESTIONS PRESENTED

1. Was the petitioner denied procedural due process and equal protection of the law contrary to the Fourteenth Amendment of the Constitution of the United States when the Appellate Division of the New York State Supreme Court excluded evidence in the record and affirmed a lower court judgment declaring rights of the parties to this proceeding?

2. Did the respondent place restraints and conditions on vested employee leave benefits and therein effect a deprivation of property and did such a deprivation of property violate substantive due process?

3. Must a deprivation of property be construed as a penalty pursuant to Section 519 of the New York State Judiciary Law?

4. Were the Constitutional questions herein presented adequately raised and addressed at the New York State Court below?

INDEX

CITATIONS

Dunn v Blumstein, 405 US 330

Board of Regents v Roth, 408 US 564

Clift v City of Syracuse, 45 AD2d 596

Forster v Scott, 136 NY 577

Perry v Sindermann, 408US 593

STATUTES CITED

28 USC 1257
28 USC 2101(c)
New York Civil Practice Law and Rules
Section 409(b)
Section 3212(b)
Section 5501(c)
4 New York Code Rules and Regulations
Sections 4.5(f)
Section 21. now 28- .
New York State Judiciary Law, Section 519
United States Constitution
First Amendment
Fourteenth Amendment

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 198____
No._____

Harold W. Schwartz, Petitioner,

v.

Mario Cuomo, Governor of the State of New York
Orin Lehman, Commissioner, New York State Office
of Parks, Recreation and Historic Preservation,
Respondent.

To the Honorable Chief Justices and Associate Justices of the Supreme Court of the United States.

Petitioner, Harold W. Schwartz, Pro Se requests that a writ of certiorari issue to review the decision and order of the Appellate Division, Second Department of the Supreme Court of the State of New York entered April 27, 1987 in the proceeding Harold W. Schwartz, petitioner versus Mario Cuomo, Governor of the State of New York, Orin Lehman, Commissioner New York State Office, Parks, Recreation and Historic Preservation, Respondent. The April 27, 1987 decision and

order finally decided the petitioner's petition pursuant to Article 78 of the New York State Civil Practice Law and Rules requesting reinstatement of the petitioner to his former position in the employ of the respondent together with backpay and lost benefits as no further review on the merits was afforded by the courts of the State of New York.

OPINIONS BELOW

The Court of Appeals of the State of New York has issued four orders in this proceeding, reported at 66 NY2d 758(Appendix D), 67 NY2d 605, (Appendix C), 70 NY2d 747(Appendix B), __NY2d___, (Appendix A). The Appellate Division (NY) has issued two opinions in this proceeding. Those opinions are reported at 111AD2d 759(Appendix E), 129 AD2d 800,(Appendix F). The Appellate Division has also denied rehearing. A copy of tha/of the opinions Supreme Court , Nassau County New York appears as Appendix G and Appendix H hereto. Those decisions are unreported.

JURISDICTION

The order of the New York Court of Appeals denying the petitioner's motion for leave to appeal was entered by the Clerk of the Court of Appeals on March 18, 1986 the petitioner subsequently moved before the Supreme Court, Nassau County (Court of original jurisdiction) in a motion to vacate the judgment entered in the proceeding. The notice of motion was served May 16, 1986 returnable May 29, 1986. Service of that notice tolled the 90 day statute of limitations. The petitioner appealed the subsequent denial of relief to the New York State Appellate Division and thereafter to the New York Court of Appeals. The order of the Court of Appeals denying leave to appeal was entered in the Office of the Clerk of the Court of Appeals on December 21, 1987. The jurisdiction o f the Supreme Court of the United States is invoked under 28 USC § 1257(3) and 28 USC 2101(c).

STATEMENT OF CASE AND BACKGROUND

The petitioner received his first appointment in the New York State Civil Service in May, 1965 at which time he was appointed to the position of Engineering Technician with the New York City Highway Department. He thereafter held a series of continuous, progressive and permanent civil service positions in the employ of New York City until March 18, 1982. On that date he accepted an appointment to the position of Senior Mechanical Construction Engineer in the employ of the respondent New York State Office of Parks, Recreation and Historic Preservation subject to a 26 through 52 week probationary period. On March 2, 1983 the probationary period was extended 15 days for approved vacation and sickleave. Then on March 15, 1983 the probationary term was extended 13 additional days due to approved absence relating to State jury service. The petitioner's employment was terminated during the jury extension by unauthorized notice origination with the petitioner's supervisor.

Although the issues of this proceeding were repeatedly pleaded before the State courts and those courts accepted the respondent's position the petitioner is convinced that the respondent's action violated the petitioner's constitutional and statutory rights and that the judgment, orders and decisions of the courts of the State of New York resulted in and must be construed as additional infringements of those rights.

In this petition the petitioner will argue that a strict scrutiny review of the New York State Court decisions entered in this proceeding indicates that there was a denial of the equal protection of the law and procedural and substantive due process. First, when the attorney of the respondent State government misrepresented evidence in order to avoid damages and obtain a judgment in its favor and second, when the New York State Appellate Courts excluded evidence in the record from their determinations and third, when the courts below ratified the respondent's action placing conditions and restraints on vested rights contrary to New York State Law and the

equal protection and due process clauses of the United States Constitution.

The petitioner will now present a concise and clear statement of the issues and his position in this brief. The United States Supreme Court in its discretion may grant certiorari pursuant to 28 USC 1257(3) and therein correct errors and injustice resulting from prior New York State Court decisions.

HOW FEDERAL QUESTION WAS PRESENTED

The Federal question involved was first raised by appeal of the Appellate Division decision (111 AD2d 759), Appendix E, and explicitly declared in the subsequent Jurisdictional Statement submitted to the New York State Court of Appeals. In the statement the petitioner asserted:

> "6. The order of the Appellate Division filed June 3, 1985 violated the restraints of Articles 6 and 11 of the Constitution of the State of New York and Amendments 5 and 14 of the United States Constitution.***
> 8. Issues likely to be raised.
> A. Did the Appellate Division deny due process and equal protection under the law to the appellant when it would not consider in its decision the lawful

effectiveness of the letter terminating the appellant's employment and therein affirmed a judgment based on incompetent and ineffective evidence.
B. Did the reasoning of the Appellate Division decision allowing extension of the appellant's probationary term based on vested leave rights deprive the appellant of property without due process and was it an unlawful penalty within the restraints of the Judiciary Law and the Constitution and therefore violated lawful procedure."

The Court of Appeals determined that a Constitutional question was not involved (66NY2d 758) (Appendix D). The petitioner takes exception to that decision and submits that the United States Supreme Court has taken the position that constitutional questions may originate as a result of a lower court decision. In its recent decision (Kentucky v Stincer, ___US____, 96 L.Ed. 2d 631) this court stated:

"Although respondent could have been more artful in presenting his due process claim to the Kentucky Supreme Court as clearly founded on the Fourteenth Amendment, he did raise a due process claim to that court, see brief for appellant, and the claim therefore is properly before us"

The record in this case therefore shows expressly and by clear implication that the federal claim was adequately presented in the state system. (Web v Web, 451 US 493).

REASONS FOR GRANTING WRIT

POINT I THE NEW YORK COURTS EXCLUDED EVIDENCE IN THE RECORD OF THIS PROCEEDING

The New York Appellate Division stated in its opinion (111 AD2d 759),(Appendix E):

> "Petitioner's argument that termination of employment was ineffective because the letter informing him thereof was only signed by his supervisor and not by the appointing authority was never raised at Special Term. An appellate court should not, and will not consider different theories or new questions if proof could have been offered had they been presented at the trial"

The Appellate Division therefore refused to consider the lawful effectiveness of significant evidence in the record before it. The Appellate Division concedes that the termination was not effected by the "appointing authority" commissioner Lehman and that had it considered this fact and supporting evidence in the record its decision would have been different and that court would have granted the relief requested in the petition.

POINT II NEW YORK LAW REQUIRES THAT APPELLATE DIVISION CONSIDER THE FULL RECORD ON APPEAL

Upon the papers submitted the Supreme Court Nassau County New York determined that no triable issue of fact existed and entered a summary judgment pursuant to CPLR 409(b)[1] and CPLR 3212(b). When summary consideration is afforded to a special proceeding "the standards of summary judgments applied to actions should be applied by the court to proceedings governed by CPLR 409(b)"(Matter of Port Authority, 18 NY2d 250,255). Summary judgment is governed by the provisions of CPLR 3212(b)which prescribes:

> "The motion shall be granted, upon all the papers and proof submitted the cause of action action or defence shall be established sufficiently to warrant the court as matter of law in directing judgment in favor of any party"

In the clear language of this statute the court of original jurisdiction was required to consider all the evidence before it in entering its summary judgment and it was not necessary for the successful party to request such relief. Thereafter upon the

1. CPLR refers to New York Civil Practice Law and Rules

original appeal to the Appellate Division from the judgment of the Supreme Court, Nassau County the Appellate Division was required to review all questions of fact and l aw pursuant to CPLR 5501(c). On such review the Appellate Division was empowered to and should have rendered such judgment as should have or could have been granted by the Nassau County Supreme Court. (Humble Oil v Jaybert, 30 AD2d 952). The Appellate Division was not bound in its review to the petitioner's pleading but rather should have searched the record and considered all questions urged upon it. (Knickerbocker v Site Selection Board, 41 AD2d 539), (State of New York v South Haven Houses, 46 NY2d 899) These decisions have their roots in the decision (Persky v Bank of America, 261 NY 212). In Persky the court of Appeals considered a case in which the defendant indorsed a note that both the courts below and the defendant-appellant assumed to be negotiable. The Persky court determined that in an appeal of a summary judgment the appellant had a right to urge upon the appellate court a proposition

of law that appeared upon the face of the record and reversed the Appellate Division judgment. The Court of Appeals again considered precisely these points in its recent decision (Merritt Hill v Windy Heights, 61 NY2d 106). Merritt Hill was based on two causes of action, the first, for breach of contract, in that the defendant did not return a deposit and second, for consequental damages resulting from the defendant's failure to perform its contract. The Supreme Court denied the plaintiff's motion for summary judgment and the plaintiff appealed. The Appellate Division thereafter granted summary judgment in favor of the plaintiff on the first cause of action and in favor of the defendant on the second cause of a action even though the defendant did not request such relief. Both parties appealed the Appellate Division decision to the Court of Appeals of the State of New York. The Merritt Hill court ruled that "The Appellate Division is a division of the Supreme Court and shares that court's power to search the record and award summary judgment to a

non movant party even where, as here the non movant did not appeal*** ***judgment may be awarded to the opposing party even in the absence of a cross motion*** ***The material facts are undisputed and mandate summary judgment"(61 NY2d 106, 111).

POINT III THE DECISIONS OF THE NEW YORK STATE COURTS INFRINGED THE PETITIONER'S RIGHT TO PETITION IN REDRESS OF GRIEVANCE

The constitution did not require that the New York State Legislature establish an appeal of right to the Appellate Division for review of judgments of the Supreme Court, Nassau County. Nevertheless the Legislature did establish this avenue of appeal and if the State discriminates against any person in administering the appeal it violates the First Amendment of the United States Constitution. The wording of the First Amendment leaves no question for it plainly states:

> "Congress shall make no law***abridging*** the right of the people***to petition the government for redress of grievance"

This court has affirmatively stated this principal in its decision (California Transport v Trucking

Unlimited, 404 US 508, 30L.Ed 2d 642).

> "The right of petition is one of the freedoms protected by the Bill of Rights,*** ***Certainly the right of petition extends to all departments of government. The right of access to the courts is indeed but one aspect of the right of petition"

This fundamental right is made applicable to State and Local Government actions by Section One of the Fourteenth Amendment of the Constitution of the United States:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States"

It is the petitioner's position that a civil suit against the state is one form of petition in redress of grievances and the appeal of right to the Appellate Division is an integral part of that petition.

POINT IV THE PETITIONER WAS DENIED THE EQUAL PROTECTION OF THE LAW BY THE COURTS OF THE STATE OF NEW YORK

The petitioner demonstrated in Point III supra that the Appellate Division decision constituted an infringement of his First Amendment

right to petition in redress of grievance. This court has held that the Fourteenth Amendment of the United States Constitution prohibits the state in enacting laws which violate this vital First Amendment right. (United Mine Workers v Illinois Bar Assoc., 389 US 217). This promise of equal protection is not limited to enactment of fair and impartial legislation but extends to the application of these laws. (Yick Wo v Hopkins, 118 US 356) The Courts have repeatedly held that laws which have a disparate effect between citizens similarly situated must be strictly scrutinized if a fundamental constitutional right is impinged upon. (Dunn v Blumstein, 405 US 330),(People Rel. Wayburn v Schupf, 39 NY2d382). When Yick Wo and Dunn decisions are read togetherit follows that the decision of the New York State Appellate Division (111 AD2d 759),(Appendix E) effecting a disparate treatment between the petitioner and other litagants similarly situated must be strictly scrutinized and may be justified only to satisfy a compelling state interest. This court has held

in (Lindsey v Normet, 405 US 56):

> "That the due process cause of the Fourteenth Amendment does not require a state to provide appellate review*** ***When an appeal is afforded, however it cannot be granted to some litagants or arbitrarily denied to others without violating the equal protection clause"

The petitioner has demonstrated in Point V infra that the New York Appellate Division decision (111 AD2d 759) effectively denied him an appeal.

POINT V THE PETITIONER WAS DENIED JUSTICE BECAUSE THE APPELLATE DIVISION DECISION DENIED HIM PROCEDURAL DUE PROCESS

The guarantee of due process is contained in the Fourteenth Amendment of the United States Constitution. The extent of the procedural protections due depend on the interests involved and the applicable laws of the legal forum which must decide the issues. The United States Supreme Court in (Morrissey v Brewer, 408 US 471) recognized that due process has "flexibility in scope once it has been determined that some process is due: it is recognition that not all situations calling for procedural safeguards call for the same procedure". In the instant case the New York

CPLR detailed the procedure due and allowed the court of original jurisdiction to enter summary judgment upon all the pleadings and papers in the record before it. Further, the CPLR included as part of such process due, an appeal of right at the request of either party. The United States Supreme Court in (Goldberg v Kelly, 397 US 254) determined that evidence before the decision-maker is an integral part of procedural due process. it follows that an exclusion of important and integral evidence from the decision-making process is a violation of due process.

POINT VI EXTENSION OF A PROBATIONARY TERM RESULTING FROM USE OF VESTED LEAVE BENEFITS VIOLATED SUBSTANTIVE DUE PROCESS

During the petitioner's tenure in the employ of the respondent he was extended leave with pay due to vacation, death in the petitioner's family, jury leave and sick leave. Each absence was authorized with pay by the appointing authority and administrative regulations (4 NYCRR 21.2, 21.6 21.9, 21.12),(now 28-). Upon entitlement, these

benefits become vested rights. The United States Supreme Court has repeatedly held that the Fourteenth Amendment due process clause is a "safeguard of interests that a person has already acquired in a specific benefit. These interests- property interests- may take many forms" (Board of Regents v Roth, 408 US 564, 33 L. Ed 2d 548), welfare benefits, unemployment insurance, tenure, and drivers license have been included among such interests by this court. Following this reasoning the New York State Courts have taken the position that infringements on leave rights transgress due process requirements of both New York and the United States Constitutions and that whenever the law deprives one of the beneficial use and free enjoyment of his property or imposes restraints upon its use, it deprives him of that property. (Clift v City of Syracuse, 45 AD2d 596)(NY)."It is not necessary in order to render a statute obnoxious to the restraints of the constitution, that it must in terms or in effect, authorize the actual physical taking of the property or the thing

itself, so long as it affects its free use and enjoyment, or the power of disposition at will." (Forster v Scott, 136 NY 577). The courts below and the respondent relied on Administrative Regulation (4 NYCRR 4.5(f)) for authority to extend the probationary term. That regulation states in part:

> "Any periods of authorized or unauthorized absence aggregating up to*** 20 work days *** may, in the discretion of the appointing authority be considered as time served in the probationary term*** and any period not so considered shall not be counted as time served in the probationary term"

POINT VII ADMINISTRATIVE REGULATIONS DENIED THE PETITIONER THE EQUAL PROTECTION OF SECTION 519 OF THE NEW YORK STATE JUDICIARY LAW

The New York State Legislature has enacted Section 519 of the Judiciary Law which states in part:

> "Any person who is summoned to serve as a juror under the provisions of this Article and who notifies his employer to that effect prior to his term of service, shall not on account of his absence be subject to discharge or penalty. An employer may, however, withold wages of any such employee serving as a juror during the period of such service and such witholding of wages shall not be deemed a penalty.***"

The respondent, however, was required by administrative Regulation (4NYCRR 21.9), (now 28-1.9) to cojtimue the petitioner's wages and benefits. Section 21.9 states in part:

> "On proof of the necessity of jury service or appearance as a witness pursuant to subpoena***an employee shall be granted a leave of absence with pay with no charge against leave credits:****"

In point VI supra the petitioner argued that such leave with pay for jury service is a vested interest and conditions and restraints on those interests must be construed as a penalty. Since "apers ns interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim for entitlement to the benefit"(Perry v Sindermann, 408 US 593, 33 L.Ed. 2d 570). Since a property right is involved the principle of equal protection requires that the interpretation of a penalty by the courts below pursuant to Section 519 of the New York Judiciary Law be strictly scrutinized. Strict scrutiny review of State Law and administrative actions was argued in point IV →

supra citing Blumstein, Dunn, Yick Wo, and Wayburn(NY) decisions in support thereof.

CONCLUSION

The issues in this certiorari petition are significant and important to the body of American Jurisprudence. The proceeding was decided upon summary consideration as are the vast majority of actions and proceedings in the court system. Precisely which questions may be raised on appeal of a summary judgment is an integral question of each such appeal. If the erroneous decisions of the New York State Courts below are not reversed then other courts will be misled in their future considerations. The petitioner is not aware of prior decisions of the United States Supreme Court regarding issues open to review in the appellate courts reviewing summary judgment below.

Most states, like New York and the Federal Government, have enacted statutes to protect jurors from retaliation from their employers. Precisely what actions of an employer constitute a penalty under these statutes is of importance to

each juror selected to serve. Jurors concerned about retaliation from their employer will be reluctant to serve. As required by constitutional mandates, American Jurisprudence is a jury system and its success depends upon the service of qualified jurors.

For these reasons and in the interest of substantial justice it is respectfully requested that the Supreme Court grant this petition for certiorari.

Dated : February 26, 1988
New York, New York

Respectfully Submitted,

Harold W. Schwartz

Harold W. Schwartz
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2141 Crotona Ave.
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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twenty-First day of December, 1987

Present, Hon. Sol Wachtler, Chief Judge, presiding.

Mo. No. 1261
In the Matter of Harold W. Schwartz,
Appellant,

vs.

Mario Cuomo, Governor of the State of New York et, al.,
Respondent,

A motion for leave to appeal to the Court of Appeals and a Motion for reconsideration of this courts September 8, 1987 order of dismissal & c. of the appeal in the above cause having been submitted thereon and due deliberation having thereupon had, it is

Ordered, that the said motion for leave to appeal be and the same hereby is dismissed upon the ground that the order sought to be appealed

from does not finally determine the proceeding within the meaning of the Constitution and not the type of non final order that comes within the meaning of CPLR 5602(subd(a), par 2): and it is

Ordered, that the said motion for reconsideration of the September 8, 1987 order of dismissal & c. be and the same hereby is denied.

/s/_____
Donald M. Sheraw
Clerk of the Court

APPENDIX B

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Eighth day of September, 1987

Present, Hon. Sol Wachtler, Chief Judge, presiding.

Mo. No. 930 SSD 59
In the Matter of Harold W. Schwartz,
Appellant,

vs.

Mario Cuomo, Governor of the State of New York, et al.,
Respondents

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

Ordered, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

/s/_____
Donald M. Sheraw
Clerk of the Court

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of March, 1986.

Present, Hon. Sol Wachtler, Chief Judge, presiding

Mo. No. 106
In the Matter of Harold W. Schwartz,
Appellant,

vs.

Mario Cuomo, Governor of the State of New York, et al.,
Respondent.

Motion for leave to appeal denied with enty dollars costs and necessary reproduction disbursements.

/s/_____
Donald M. Sheraw
Clerk of the Court

APPENDIX D

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Co rt, held at Court of Appeals Ha in the City of Albany on the twenty-fourth day of October, 1985

Present, Hon. Sol Wachtler, Chief Judge, presiding,

Mo. No. 1085 SSd146
In the Matter of Harold W. Schwartz,
Appellant,

vs.

Mario Cuomo, Governor & c., and
Orin Lehman, Commissioner, New York State Parks and Rec. Dep.
Respondent.

The appellant having filed notice of appeal in the above titled proceeding and due consideration having been had, it is

Ordered, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Judge Simons took no part.

/s/_____
Donald M. Sheraw
Clerk of the Court

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

111 AD2d 759

April 15, 1985

Leon D. Lazer, JP
Lawrence J. Bracken
Frank D. O'Connor
Richard A. Brown, JJ

In the Matter of Harold W. Schwartz,
Appellant,

v

Mario Cuomo, Governor of the State of New York, et al.,
Respondents.

In a CPLR Article 78 proceeding to compel the reinstatement of the petitioner to his position of Senior Mechanical Construction Engineer with the New York State Office of Parks and Recreation, and for related relief, the petitioner ap peals from a judgment of the Supreme Court, Nassau County (Brucia, J), entered January 25, 1984, which dismissed the petition.

Judgment affirmed, with costs.

Petitioner began his employment with the New

York State Office of Parks and Recreation on March 25, 1982. His position was subject to a probationary term of 26 to 52 weeks, with the longer period applying absent contrary written notice (4NYCRR 4.5(a)(1),(5)(i)). On December 30, 1982, petitioner was informed by his supervisor that his employment would be terminated when his probationary term ended on March 23, 1983. The record contains many indications that petitioner's supervisor found petitioner's work unsatisfactory Near the end of his probationary term, petitioner's employment was twice extended to reflect absences. The second extension, from April 13, 1983 to May 2, 1983, comprised 13 workdays, reflection that petitioner was absent while on authorized jury duty leave. On April 1, 1983, petitioner was notified that his employment would terminate on April 15, 1983, and at the close of business on that date his employment ended.

Petitioner argues that the extension of his probationary term, to reflect absences while

on jury duty, was a "penalty" within the intendment of Judiciary Law 519. We disagree. Respondents have explicit authority to extend a probationary term to reflect absences (4 NYCRR 4.5(f)). The rational of that regulation is to afford respondents the opportunity to observe and evaluate probationers performance for an entire 52-week period (Matter of Fischer v Hongisto, 75 AD2d 973). Extension of a probationary term for this legitimate purpose is not a penalty when based upon absence due to sick leave or vacation, and we see no reason to consider it a penalty merely because a given absence was caused by jury service. Respondents were obligated to excuse petitioner from his duties during jury service, but not to credit that time toward petitioner's prob tionary term.

Petitioner's argument that termination of his employment was arbitrary and capricious is likewise without merit. The record contains sufficient evidence that petitioner's supervisor found his work performance unsatisfactory

APPENDIX E

Petitioner's argument that the termination of his employment was ineffective because the letter informing him thereof was only signed by his supervisor and not by the appointing authority, was never raised at special Term. "An appellate court should not and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial"(Rentways Inc. v O'Neill Milk & Cream Co., 308 NY 342,349). This rule applies at bar, where petitioner raised the argument in question for the first time in his reply brief.

Lazer, JP, Bracken, O'Connor and Brown, JJ Concur.

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

Richard A. Brown, J.P.
James F. Niehoff
Thomas R. Sullivan
Stanley Harwood, JJ

April 27, 1987

276E
In the Matter of Harold W. Schwartz,
Appellant,

v.

Mario Cuomo, etc.,et al,
Respondents

In a proceeding pursuant to CPLR Article 78 to compel the reinstatement of the petitioner to his position of Senior Mechanical Construction Engineer with the New York State Office of Parks and Recreation, the petitioner appeals from an order of the Supreme Court, Nassau County (Becker J) dated June 3, 1986, to vacate a prior judgment of the Supreme Court, Nassau County (Brucia, J.), entered January 25, 1984, which dismissed his petition (see, Matter of Schwartz v Cuomo, 111 AD2d 759,)(appeal dismissed 66 NY2d 758).

Ordered that the order is affirmed, without costs or disbursements .

The petitioner failed to show that the respondents misrepresented to the court the propriety of his notice of termination. Thus, the court correctly denied the petitioner's motion pursuant to CPLR 5015(a)(3) to vacate the prior judgment.

We reject the petitioner's other claims. Those claims were either adjudicated on the prior judgment and appeal therefrom and are thus now barred by the law of the case (see, Siegel, NY Prac. 448) or by the Statute of Limitations(see, CPLR 217), or, now be considered for the first time, they should not now be considered(see, Orellano v Samples Tire Equip. & Supply Corp., 110 AD2d 758).

Brown, J.P., Niehoff, Sullivan and Harwood, JJ concur.

April 27, 1987

Enter:

/s/_____
Martin H. Brownstein
Clerk

APPENDIX G

SUPREME COURT, NASSAU COUNTY
SPECIAL TERM, PART I

Index No. 15148/83

In the Matter of a Special Proceeding by

Harold W. Schwartz,
Petitioner,

v

Mario Cuomo, Governor of the State
Of New York, etc., et al.,
Respondents

Dated:
December 22, 1983

In this proceeding under CPLR Article 78 petitioner seeks judgment , requiring his re-instatement to his prior position of Senior Mechanical Construction Engineer and his compensation from the date of the allegedly improper termination of his services in that position.

Thereis no marit to petitioner's contention that his probztionary period expired at the end of the twenty-sixth week after his appointment to the position beczuse he had not previously been advised that the period would be extended to the maximum

allowable duration of fifty-two weeks. His reliance upon Matter of Albano v Kirby, 36 NY2d 526, is misplaced since the provisions of the regulation interpreted therein were significantly different from those o f the Civil Service Rule (4 NYCRR 4.5(a)(5)(i)) pertaining to petitioner's probationary status.

Under the regulation in effect at the time of the petitioner's appointment and during his service thereunder, the appointment was not to become permanent until after completion of the maximum period of probation which , in petitioner's case, was fifty-two weeks, or until earlier written notice following completion of the minimum period of probation, namely, twenty-six weeks. There is no claim that petitioner received such earlier notice and on the contrary, he was notified in writing that his probationary period would be extended through the maximum 52 weeks. That he didn't receive the notification until after the expiration of the initial twenty-six week period is of no consequence since, under

the rule, no notice was required to be given at all.

Petitioner is in error in his contention that the extension of probationary term by the number of days of authorized absence for jury duty constituted a penalyt within the contemplation of Judiciary Law 519. Although, under 22 NYCRR 4.6(f), the appointing authority might, in the exercise of his discretion, have considered as many as twenty days of petitioner's authorized or unauthorized absence as time served in the probationary term, he was under no obligation to do so and , having apparently chosen not to exercise such discretion, respondent, Lehman, did not act improperly in excluding petitioner's authorized leave, including that for jury service, from the probationary term. While respondent, Lehman, was obligated to excuse petitioner from his duties to enable nim to render service as a juror, he was not required to credit him with his authorized absence in determining the duration of his probationary term. The exclusion of such

leave from the probationary term was no more a penalty than would be the with holding of wages during a period of jury service which is specifically authorized under the aforesaid statute.

Petitioner's employment having been terminated prior to the expiration of his probationary term as lawfully extended by respondent, Lehman, through his subordinates, petitioner is not entitled to the relief which he seeks in this proceeding.

Accordingly, the petition is dismissed.

/s/ James J. Brucia, J.S.C.

APPENDIX H

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU, Index No.15148/83

In the Matter of a Special Proceeding by,
Harold W. Schwartz,
Petitioner,

v.

Mario Cuomo, Governor of the State of New York
Orin Lehman, Commissioner, New York State
Office of Parks, Recreation and Historic
Preservation,
Respondent.

Order (CPLR 5015(a)(3) setting aside the judgment entered 1/25/ 84 (Brucia J) is denied.

By decision dated 12/22/84 Mr. Justice Burcia dismissed an Article 78 proceeding brought by Harold W. Schwartz challenging his termination of employment as a Senior Mechanical Construction Engineer. That determina tion was affirmed by the Appellate Division, Second Department. The Court of Appeals dismissed an appeal from that determination. A recent motion in the Appellate Division to "reargue" was denied.

The "petition" before me at this time seeks

to vacate the prior judgment on grounds of "fraud, misrepresentation, and misconduct" The application is without merit.

This order concludes the within post-judgment proceeding assigned to me pursuant to the provisions of Part 202 of the Uniform Rules for New York State Trial Courts.

Dated: June 3, 1986

/s/_____
Francis X. Becker, J.S.C.